UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued September 14, 1982)

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. PAUL C. WEICK, Senior Circuit Judge*
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA
Plaintiff-Appellee

No. 81-2212 vs.

ANTHONY GIACOMINO
Defendant-Appellant

Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division.
No. 81 CR 30
Honorable George N. Leighton, Judge.

ORDER

Defendant-Appellant Anthony Giacomino has appealed to this court from the judgment of conviction entered by the district court upon the jury's verdict finding him guilty on all three counts of an indictment charging him with obstruction of justice, in violation of Title 18, United States Code, Section 1503; mail fraud, in violation of Title 18, United States Code, Section 1341; and damaging by explosive a facility used in interstate commerce in violation of Title 18, United States Code, Section 844(i). Defendant was sentenced to a total of seven years imprisonment and fined $16,000.

In his Brief filed in this court, appellant states the issues on appeal as follows:

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* The Honorable Paul C. Weick, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

ISSUES PRESENTED FOR REVIEW

Defendant-Appellant raises three issues for review in this Court. They concern the insufficiency of the evidence to prove any connection between the Defendant and the fire at his place of business which consumed business records subject to a Grand Jury subpoena; the admissibility of so-called "other crimes" evidence; and the sanction appropriate to the prosecutive misconduct which the District Court found.

Upon consideration of all three issues, we find no merit in any of them and for the reasons hereinafter set forth, we affirm.

I

The Facts

In the winter of 1979, the City of Chicago suffered record snowfalls, the massive amounts to which it was ill-equipped to remove, and making it necessary to engage outside contractors for assistance. In order to finance the removal of the snow, the City received substantial amounts of money from the federal government, which were provided by the Federal Disaster Assistance Administration. Defendant Giacomino d/b/a Giacomino Transport, Inc., and Green Lakes Landscaping, billed the City of Chicago $1.6 million dollars for six weeks of snow removal work performed as an outside contractor. These billings were among the top ten highest charged the City.

In December 1979, a federal grand jury commenced to investigate defendant's snow removal billings. In January 1980, at different times, a total of four grand jury subpoenas were served on defendant, calling for the production of books and records of Giacomino Transport, Inc., State Transport, Inc., State Construction Company and Green Lakes Landscaping. All were returnable by January 30, 1980.

On January 28, 1980, at about 10:15 p.m., a fire started on defendant's property in two adjoining construction trailers used as offices for the defendant's four companies, which fire destroyed most of the records subpoened by the grand jury. A number of defendant's current operating records contained in fireproof cabinets were not destroyed. Noteworthy is the fact that on the day of the fire, certain records located in the Green Lakes Landscaping area of the trailers were removed. Also, just before the day of the fire, defendant's personal filing cabinet, television set and a radio base station were removed. Also defendant's dog, which was usually kept in the trailers overnight, was in another building adjacent to the trailers. The night watchman did not work on that night. January 28 was the day before municipal fire hydrants were to be hooked up at defendant's property.

Most important, however, was the defendant was the last to leave the premises at about 9:15 p.m., locking the doors behind him. Firemen found the doors locked when they arrived at 10:15 p.m.

The fire was discovered by Donald Carey, an employee of defendant, who had dinner that evening with his girlfriend and was driving her home, when he decided to show her his place of employment. Carey then went to a restaurant and telephoned the fire department notifying it of the fire along with the defendant and several supervisors. When defendant arrived at the scene, he criticized Carey for what he had done and told him to keep his mouth shut or he would kill him.

Two fire departments arrived with three tankers, which tankers had to be refilled three times and consumed over 10,000 gallons of water and it took over a hour to extinguish the fire in the two trailers.

The firemen, while fighting the fire, observed a number of things which indicated that the fire had been deliberately set. They noticed that the fire kept flaring back up after they had

apparently gotten it under control. They observed that dense black smoke came from the trailers. They saw the ground underneath the trailers burning from a liquid coming through a hole in the breezeway connecting the two trailers. Chief White of the Bensenville Fire Department then called Deputy State Fire Marshal, Harry Schaefer, to the scene. Schaefer and other firemen observed several holes in the floor of the north trailer. He picked up two rags smelling like gasoline and found two plastic containers smelling like gasoline near a hole. Schaefer submitted eight debris samples including the rags and the plastic containers smelling like gasoline to the Illinois Department of Law Enforcement Crime Labratory for analysis. Five of the samples tested positively for gasoline, two for diesel fuel and one for gasoline and diesel fuel.

Both Schaefer and White testified at the trial that based on their knowledge, experience and observations, the fire had been deliberately set.

II

The Defendant's Motive

Dennis Moore, employed as a truck driver by the defendant, testified that defendant instructed him and other drivers to sign in at two different locations in the City of Chicago on the same day, using fictitious names and truck numbers. Moore and the other truck drivers were instructed by defendant to sign in as if he was driving a semi-dump truck, when in fact he was actually driving a six-wheel dump truck billed to the City at a much lower rate. They followed defendant's instructions. Mildred Knudsen, defendant's bookkeeper, testified that defendant collected and deposited himself checks received from the City of Chicago and gave her only a deposit receipt, whereas usually she obtained checks, prepared deposit slips and then gave the checks to another employee to enter in the cash receipts journal. An FBI Agent, Kevin Deery, testified that the

defendant's records were subpoened in part to verify whether all of the drivers and truck equipment listed on the billings appeared in defendant's records.

III

Sufficiency of the Evidence

In determining this issue, we are required to view the evidence, as well as the inferences properly deduceable therefrom, in the most favorable light to the government. *United States v. Glasser,* 315 U.S. 60, 80 (1942). We are not permitted to weigh the evidence, but only determine whether there was substantial evidence to prove the guilt of defendant beyond a reasonable doubt. Defendant argues that no witness testified that he set fire to the trailers. It was clearly shown by circumstantial evidence that defendant caused the fire.

Arson is not usually committed in the presence of witnesses in broad daylight. It is "by its very nature secretive and usually incapable of direct proof." Circumstantial evidence may be used to prove motive, opportunity and even the identity of the arsonist. *People v. Smith,* 44 Ill. App. 3rd 237, 357 N.E. 2d 1320, 1323 (1976). We have so held. *United States v. Cyphers,* 553 F. 2d 1064 (7th Cir. 1977), *cert. denied,* 434 U. S. 843 (1977). *Boone v. Royal Indemnity Co.,* 460 F. 2d 26, 29 (10th Cir. 1972).

The circumstantial evidence disclosed defendant's motive. His instructions to his drivers to fleece the City by the use of fictitious names and fictitious trucks in reporting their work to the City; his careful planning for the fire by removing from the trailers personal property and records that he did not want to be destroyed by fire; in arranging for the removal of his dog to an adjacent building; by arranging for the fire to take place on a night when the janitor was not working and on a day when the municipal fire hydrants had not been connected; also, his threats to his employee, Donald Carey, to keep his mouth shut

or he would kill him; also his collecting the checks personally from the City and making the deposits which was the function of his bookkeeper.

Most important is the fact that defendant was the last to leave the trailers when he locked the doors at 9:15 on the night of the fire and the doors were still locked when the firemen arrived at 10:15 p.m.

We find no violation of Rule 403 of the Rules of Evidence in the admission of other crimes evidence tying the defendant to the underlying offense, as it was admissible to show his motive to obstruct the grand jury investigation. The district judge did not abuse his discretion in admitting such evidence. *United States v. Bradwell,* 388 F. 2d 619 (2nd Cir.), *cert. denied,* 393 U.S. 867 (1968). *United States v. Simmons,* 444 F. Supp. 500, 507 (E.D. Pa. 1978). The district judge instructed the jury that the evidence was to be considered only as to the defendant's motive. This instruction removed any possible prejudice from the introduction of such evidence. *United States v. Bradwell, supra.*

IV

No Sanction Is Appropriate For Alleged Prosecutive Misconduct

Defendant contends that prosecutive misconduct justifies reversal of his conviction and the dismissal of the indictment. The alleged misconduct by the prosecutor took place in an interview with fire investigator Karl Scheel and an Assistant United States Attorney assigned to the case and Special Agents Swanson and Jack Steven, which lasted about an half hour. A grand jury subpoena had been served on Scheel calling for his appearance before the grand jury on March 5, 1980. The subpoena was continued at Scheel's request until March 19, 1980.

At the interview, Scheel discussed his investigation and findings generally. He knew that the defendant was involved in a snow scandal. He had spoken to defendant after his investigation and told him of his findings. The prosecutor told Scheel that they had strong evidence that the fire was set and that it was an arson fire. The prosecutor said that he felt that Scheel had been offered money to report the fire as accidental and he was going to prove that Scheel took money. No evidence was offered at the trial as to these accusations by the prosecutor.

This meeting took place four months before Scheel testified before the grand jury and 10 months before he testified as an expert witness for the defendant at his trial.

Defendant contends that the accusations of the prosecutor against Scheel prejudiced him in his use of Scheel as an expert witness. There was no evidence, however, that defendant was prejudiced in any manner by the accusations which had no effect on Scheel who did testify as an expert witness for defendant at his trial. His direct examination lasted a full day, the transcript of which consists of 50 pages. Scheel adhered to his conclusion that the fire was apparently electrical in origin. He explained in detail his investigation and the basis of his conclusion, just as he did in his report and in his grand jury testimony.

In his grand jury testimony, however, he stated that he did not have an expert opinion as to the cause of the fire and it is obvious that he did not have all of the facts to justify such an opinion. He had not talked to any of the fire department investigators and did not know that debris samples had been taken and tested. He denied that the questions by the government changed his opinion. The trial judge was of the view that Scheel had not been fairly treated by the prosecutor, but did not find that there was any basis for imposing sanctions or for reversing defendants conviction and dismissing the

indictment. We agree. The trial judge did not permit the prosecutor to cross-examine Scheel as to his testimony before the grand jury.

The judgment of conviction is affirmed.

Unpublished Per Curiam Order

JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 27, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. PAUL C. WEICK, Senior Circuit Judge*
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 81-2212 vs.

ANTHONY GIACOMINO
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 30
Judge George N. Leighton.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date.

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* The Honorable Paul C. Weick, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued September 14, 1982)

November 17, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. PAUL C. WEICK, Senior Circuit Judge.*
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA
Plaintiff-Appellee

No. 81-2212 vs.

ANTHONY GIACOMINO
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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Honorable George N. Leighton, Judge.

ORDER

Upon consideration of the petition for rehearing filed by Defendant-Appellant, we are of the opinion that the issues in this appeal were adequately treated in our order affirming the judgment of conviction and that the petition for rehearing lacks merit.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied.

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